

Because they say so!

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Maximilian Steinbeis Sa 13 Mai 2017

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Dear Friends of Verfassungsblog

Was that a threat? In a large op-ed in the Frankfurter Allgemeine Zeitung this week (May 11, p.6, not online so far), the Speaker of the German Parliament Norbert Lammert made a rather blunt statement towards the Federal Constitutional Court, recommending the justices to apply some "smart restraint" unless they do not want to see the constitution itself amended to eliminate the problems the legislators keep having with regard to the Karlsruhe Court: "A legislator who is limited in his creative possibilities will try to defend himself" and write, what he cannot enact under constitutional law, right into the constitution itself.

These are not empty words. While the current grand-coalition four-fifth majority in the Bundestag is unlikely to realize any major constitutional reforms before the elections in September, the anger in Parliament against the Court will certainly outlive the legislature and make the required two-thirds majority in both chambers a realistic goal. In some areas, such as electoral law or European politics, the people's representatives feel their scope of movement so tightly constrained by court-ordered constitutional requirements that they feel they can hardly do anything any more at all without triggering an alarm in Karlsruhe: Every time we make a political decision and take responsibility, the Karlsruhe Eight put on their scarlet caps and frown. Tsk-tsk, wrong again. How dare they?

Parliament threatening the Constitutional Court – doesn't this resemble the sort of behaviour we know from Hungary and Poland? That would be a serious misunderstanding, though. First of all, the word threat is misplaced here. The Constitutional Court measures the deeds of the legislator with the yardstick of constitutional law, and if the constitutional law is amended observing the constitutional procedures and limits, this is not an affront towards the Constitutional Court but precisely what the constitution itself empowers legislators to do. That would indeed be an outrage if the legislator lacks the majority for constitutional change, as in Poland, or if it writes a new anti-pluralistic and anti-democratic new constitution, as in Hungary. To fix a problem with the electoral law by defining the constitutional standards in an appropriate way is not an outrage, though, but squarely within the job description of a constitutional legislator.

Secondly, there are valid constitutional arguments to problematize the conduct of the Federal Constitutional Court itself. As is well known, the jurisprudence from Karlsruhe is strongly influenced by the academic *Staatsrechtslehrer* on the bench who at times like to inject into the reasoning of the Court a heavy dose of something that is not accidentally designated by the thoroughly German word *Dogmatik*: the attempt to interpret the authoritative constitutional text as a consistent set of principles from which abstract standards for all sorts of individual constellations can be derived in a strictly scientific way. These standards are dogmatic in a sense that they claim normative validity "because I say so". But who is I? The constitutional legislator is entitled to be dogmatic in that way, but a law professor is not, however sincerely she claims that she draws her insights from pure science and nothing else. She must give reasons to validate her normative postulations, and these can and will be contested. At the beginning of the 1990s, Justice Paul Kirchhof found it highly plausible that all German citizens, on the basis of their right to vote, should be entitled to have European treaty amendments individually controlled in Karlsruhe, and he could convince enough of his Senate colleagues in the Maastricht case to share his interpretation of Article 38 to turn it into a piece of constitutional jurisprudence. Many others, however, do not find this not plausible at all and keep asking persistently: What on earth makes you think that? At this point the authority of the Constitutional Court is at stake, and this is what gives Lammert's demand for more restraint its thrust. Karlsruhe would be well advised to listen to him.

Constitutional Crises

US President Trump has fired the FBI director while his team is under investigation in a scandal that might turn out to be of Watergate proportions at least. The horror about this unprecedented act of brazenness was

expressed by many in a word that seems to sum up the whole drama of this situation: constitutional crisis! Whether this term is appropriate in this context, though, is one of four short questions we have asked SANFORD LEVINSON, whose likewise [succinct answers](#) include this: the ousting of the FBI director is by itself not a constitutional crisis but the lack of constitutional ways to oust Trump is.

Speaking of crisis: it has been two and a half years since the Italian Constitutional Court issued its notorious Sentenza 238/2014, placing claimants' human rights above Germany's state immunity against individual compensation claims for Nazi crimes. In the Villa Vigoni – a German state property in Italy that might be seized in the process – a conference was held this week at which German and Italian lawyers were looking for solutions together in an act of academic diplomacy. We document the conference in an accompanying online symposium with contributions by [ANNE PETERS](#), [VALENTINA VOLPE](#), [ANDREAS OF ARNAULD](#), [PAOLO PALCHETTI](#), [HEIKE KRIEGER](#), [ALESSANDRO BUFALINI](#), [RICCARDO PAVONI](#) and [CHRISTIAN TAMS](#) and [live-stream](#) the final day of the conference on Saturday with discussion reports, a roundtable discussion with PIERRE-MARIE DUPUY, VALERIO ONIDA and BRUNO SIMMA and a keynote speech by CHRISTIAN TOMUSCHAT.

In the UK, post-Brexit discontent might take on a totally new dimension once investors start counting their financial damages caused by Brexit and present their bills to Her Majesty's Treasury. The bilateral investment protection treaties, [according to IOANNIS GLINAVOS](#), contain some indications that this could make the already substantial Brexit bill awfully expensive indeed.

Elsewhere

THERESA RICHARZ asks how the recent decisions by the Brunswick Higher Regional Court and the European Court of Human Rights about the [prohibition of surrogate motherhood](#) can be reconciled with the interest of the child,

STEVE PEERS analyzes the CJEU's recent ruling on the [right of residence of alien parents of children with union citizenship](#),

TIM OLIVER considers how the [mega-metropolis of London could find an appropriate place in British constitutional law](#),

DENIS BARANGER tries to imagine how [President Macron can effectively govern](#) after the French parliamentary elections,

MALKAZ NAKASHIDZE reports on the recent efforts to strengthen [parliamentarism in Georgia](#),

JUNGENG ZHENG sees in the [brutal hunt of homosexuals in Chechnya a crime against humanity](#),

AZIZ HUQ puts [Trump's dismissal of FBI chief Comey](#) into the context of developments in Hungary, Poland and Venezuela and finds legality to be wrong question, while BOB BAUER disentangles the legal difficulties Trump might have got himself into by confessing that he had [talked to Comey three times about whether or not he himself is under investigation](#).

So much for this week. All the best, and take care,

Max Steinbeis

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